MOOI KIM MING & ANOR.

v.

TANG SIA BAK

HIGH COURT MALAYA, IPOH
ANUAR ZAINAL ABIDIN J
[CIVIL SUIT NO. 1661 OF 1985]
11 NOVEMBER 1987

TORT: *Negligence - Road accident - Defence of inevitable accident - Quantum - Damages awarded - Second plaintiff discharges himself from government hospital against medical advice and readmits into private hospital - Expenses incurred at private hospital - Whether reasonable to claim for defendant.*

The plaintiffs were injured when the defendant's motorcar encroached onto the other side of the road and collided into a car and two motor-cycles consequent to which the plaintiffs were injured. The defendant raised the defence of inevitable accident and stated that he swerved to the right when he saw a cat suddenly crossing the road thereby encroaching onto the other side of the road.

The first plaintiff suffered a fracture of the right femur, right tibia, left 1st metatarsal, right 5th metacarpal and right tibial plateau and 1 cm shortening. The 2nd plaintiff suffered a fracture of the right femur, left media mallealus with deformity of the right thigh and 1.5 cm shortening. However, the second plaintiff had discharged himself from the government hospital against medical advice but had admitted himself into a private hospital the same day. Counsel for the defendant argued that expenses incurred at the private hospital were not reasonable.

Held:

[1] Having considered the evidence, the defendant was found to be negligent and wholly to blame for the accident.

[2] The *first plaintiff* was awarded the following damages:

General Damages for pain and suffering RM30,000 with interest at 8% per annum.

Damages for diminished earning capacity RM5,000.

Loss of earning RM7,500 with interest at 4% per annum.

Special Damages at RM983 with interest at 4% per annum.

[3] As regards the *second plaintiff* his action of discharging himself from a government hospital and readmitting himself into a private hospital could not be regarded as unreasonable. He was entitled to claim for the expenses incurred by him for the treatment at Hospital Fatimah.

[4] General Damages for pain and suffering RM30,000.00 with interest at the rate of 8% per annum.

Damages for diminished earning capacity RM5,000.

Loss of income RM7,200 with interest at 4% per annum.

Special Damages RM5,576.30 with interest at 4% per annum.

Costs to the plaintiffs

[Plaintiffs' claim allowed with costs.]

Case referred to:
Lee Eng Beng & Anor. v. Torairajah & Ors. [1986] CLJ (Rep) 173

Editor's Note

The defendant appealed to the Supreme Court *vide* Civil Appeal No. 249-87 against this decision of the High Court, Ipoh. The Supreme Court comprising Lord President Tun Datuk Haji Mohamed Salleh Abas, (as he then was), Datuk George Edward Seah Kim Seng and Tan Sri Datuk Hashim Yeop Abdullah Sani, dismissed the appeal against liability but allowed the appeal against quantum and varied the quantum on 23 May 1988 as follows:

First Plaintiff:

General Damages:

[1] Pain and suffering reduced to RM20,000 with interest at the rate of 8% per annum from the date of service of Writ until the date of Judgment;

[2] Diminished earning capacity disallowed and award set aside;

[3] Loss of earning - confirmed RM7,500 with interest at the rate of 4% per annum from date of accident till date of judgment;

[4] *Special Damages* (medical treatment and report) - confirmed RM983 with interest at the rate of 4% per annum from date of accident till date of judgment.

Second Plaintiff

General Damages:

[1] Pain and suffering reduced to RM15,000 with interest at the rate of 8% per annum from date of service of Writ till date of judgment;

[2] Diminished earning capacity disallowed and award set aside;

[3] Loss of income reduced to RM3,600 for 6 months at RM600 per month;

[4] Special Damages (medical expenses) reduced to RM1,500.

[Appeal against liability dismissed. Appeal against quantum allowed and varied]

JUDGMENT

Anuar Zainal Abidin J:

This is an accident case in which the car driven by the defendant went over to the other side of the road and collided into a car and two motor-cycles.

The defendant raised one defence only. He claimed that the accident was an inevitable accident. He said as he was travelling he saw a cat suddenly crossing the road. He braked and swerved to the right. In doing so he encroached onto the right side of the road and collided into a motor-cycle. He denied having collided into two motor-cycles and a car.

I did not accept the defendant allegation that there was a cat crossing the road. In my view the defendant was not telling the truth when he said that he saw the reflection in the cat's eyes by the light of his car. If he could see the cat's eyes then the cat was not crossing the road because he could only see the cat's eyes if the at was facing in his direction. If the cat was crossing then the cat would be facing the other side of the road and I do not think the defendant could see the eyes. The argument seems to be childish but to my mind there is

no other conclusion I could have arrived at. If the cat was crossing the road then certainly the defendant could not have seen its eyes. He was therefore not telling the truth when he said he saw the cat's eyes when the cat was crossing the road.

In any event avoiding a cat is no excuse for the defendant to go across the road and knock into three vehicles and injuring two persons.

The defendant denied he had collided into two motor-cycles and one car. But his police report confirmed that he collided into two motor-cycles and a car. When referred to the report the defendant tried to blame the police saying that the police may have heard him wrongly. This is certainly an abuse of process of Court and I find this statement to be a blatant lie. I do not think the defendant could deny the truth of his own police report. I see that the defendant had signed the report. He cannot now come to Court and say that the report is wrong.

I regret to say this but this is one case where the defendant has wasted a lot of the Court's time. I think the facts are clear and the parties could have settled the matter out of Court.

Having considered the evidence I found the defendant negligent and wholly to blame.

As for damages in the case of the first plaintiff, he suffered fracture of right femur, right tibia, left 1st metatarsal, right 5th meracarpal and right tibial plateau. In the case of *Lee Eng Beng and Anor. v. Torairajah & Ors* [1986] CLJ (Rep) 173, the supreme Court awards the plaintiff for similar injuries a sum of RM31,500 after taking into consideration for overlapping.

In my view the injuries in the present case are more severe and a sum of RM30,000 would be a reasonable figure and I order accordingly.

The injuries have also affected the plaintiff to some extent in his ability to perform his work. He is unable to squat. Because of this his earning capacity is diminished. He should be compensated for this. In my view a sum of RM5,000 for diminished earning capacity is reasonable in the circumstances.

At the time of the accident the plaintiff was working as a sawmill earning about RM750 p.m. this was not seriously challenged. The plaintiff also stated he was unable to work for ten months. He therefore suffered a loss of RM7,500. I would award this amount as the loss of income for ten months.

I would also award a sum of RM983 for expenses incurred for the medical treatment and the report. I have to mention this here because the defendant has also appealed against this award although I cannot understand the reason. As regards the second plaintiff he suffered fracture of right femur, left medial malleolus. There is now a deformity of the right thigh. The injuries are similar to the injuries suffered by the first plaintiff, similar award should be given. I would therefore given an award of RM30,000 for the pain and suffering and RM5,000 for diminished earning capacity.

The second plaintiff discharge himself from the Hospital Besar, Ipoh on 13 April 1985 according to the doctor against medical advice. However I should disregard this comment because the plaintiff had himself admitted to Hospital Fatimah the same day.

The learned Counsel for the defendant submitted that the expenses incurred for treatment at Hospital Fatimah is not reasonable. The only reason put forward is that the plaintiff had discharged himself against medical advice. With respect I am unable to agree with that submission. Although the plaintiff had discharged himself from Hospital Besar, Ipoh he did so apparently to get better treatment at Hospital Fatimah. I do not think such action could

be regarded as unreasonable. I think the plaintiff is entitled to claim for the expenses incurred by him for the treatment at Hospital Fatimah. The expenses awarded under this head is RM5,576.30.

As a result of the accident the second plaintiff was unable to work for more than a year. He claimed that he was earning about RM200 p.m.

The plaintiff was put in plaster cast until 5 September 1985. I think it is reasonable to allow another seven months after the plaster cast was removed for the plaintiff to fully recover. In my view it is reasonable to allow the claim that the plaintiff was completely out of work for twelve months.

The plaintiff was not able to prove the actual earning that he was getting at the time when he met with the accident. However it is not seriously disputed that he was working as a welder. He said that his income now is between RM22 to RM32 per day depending on whether he was working locally or outstation. Based on this I would put his average salary as RM23 to RM24 per day. He would therefore be earning between RM598 to RM624 p.m. if he works 26 days in a month. In my view his average income could be about RM600 p.m. I would therefore award a sum of RM7,200 for actual of earning.

For the above reasons I would give the following award:

First Plaintiff

1. General Damages RM30,000 + int. 8%
2. Diminish earning capacity RM5,000 (no interest)
3. Loss of earning RM7,500 + int. 4%
4. Special Damages RM983 + int. 4%

Second Plaintiff

1. General Damages RM30,000 + int. 8%
2. Diminish earning capacity RM5,000 (no interest)
3. Loss of income RM7,200 + int. 4%
4. Special Damages RM5,576.30 + int. 4%

I would also give costs to the plaintiffs.

Also found at [1988] 2 CLJ 797